93-511

No.

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October 1993 Term

DOLORES CHISNELL, Executrix of the Estate of ALBERT J. ROBITZER, JR., and in her own right as the natural sister of decedent, ALBERT J. ROBITZER, JR., and BARBARA ROBITZER and KRISTINE D. JANKOUR,

Petitioner

vs.

PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT, PENNSYLVANIA STATE POLICE, ROBERT JOHNSON, CLAIR WITKOWSKI, STEVE SANDROVICH, JAMES McDONALD and RONALD K. RANDIC, Individually and in their capacity as agents of the PENNSYLVANIA STATE POLICE and PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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6 pp

QUESTIONS PRESENTED

I. WHETHER THIS COURT'S HOLDING IN GRAHAM V. CONNOR, 490 U.S. 386 (1989) MANDATES THAT ALL ELEMENTS OF THE JOHNSON V. GLICK, 481 F.2d 1028 (2nd Cir. 1973) cert. den., 414 U.S. 1033 (1973) TEST ARE NOW APPLICABLE TO CLAIMS UNDER 42 U.S.C. 1983 ARISING OUT OF AN ALLEGED EXCESSIVE FORCE VIOLATION OF RIGHTS SECURED UNDER THE FOURTEENTH AMENDMENT.

II. WHETHER INTENTIONAL STRIKING AND PUSHING OF AN INDIVIDUAL BY POLICE OFFICERS SUFFICIENT TO CHANGE HIS OR HER LOCATION AND BRIEFLY TERMINATE THEIR FREEDOM OF MOVEMENT CONSTITUTES A SEIZURE FOR PURPOSES OF PROSECUTION OF A SECTION 1983 CLAIM UNDER THE FOURTH AMENDMENT.

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REPORTS OF PREVIOUS OPINIONS

A Memorandum Opinion and Order was entered by the Honorable William L. Standish of the United States District Court for the Western District of Pennsylvania on June 9, 1992 and is set forth at Appendix 1a.

An order was also entered September 24th, 1992, by the Honorable William L. Standish denying Petitioner's Motion for New Trial set forth at Apendix 36a.

A Judgment Order was entered by the United States Court of Appeals for the Third Circuit on June 30, 1993 affirming the decisions of the District Court; a copy of the order is set forth at Appendix 38a and is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on June 30, 1993, affirming the decision of the United States District Court for the Western District of Pennsylvania granting summary judgment and denying Petitioners' Motion for new trial.

Jurisdiction to review the judgment entered by the United States Court of Appeals for the Third Circuit is conferred upon this Court by 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendments Four and Fourteen; 42 U.S.C. § 1983.

See Appendix at 40a for text.

STATEMENT OF THE CASE

This 42 U.S.C. § 1983 action was commenced on behalf of the Estate of Albert J. Robitzer, Jr., a 47 year old heart transplant candidate who died at the hands of the Pennsylvania State Police Bureau of Liquor Control Enforcement during a "raid" of a fundraising dance for his benefit. He had been struck and pushed repeatedly while walking toward the officers and speaking in an effort to calm them and on at least one occasion after they had been told he was the object of the fund raiser and a heart transplant candidate. The blows caused an immediate physiological reaction which in Mr. Robitzer's weakened condition caused his death moments later.

A complaint initially filed in the Court of Common Pleas of Westmoreland County, Pennsylvania, was removed by the

Respondent to the United States District Court for the Western District of Pennsylvania and after the pleadings were closed a Motion for Summary Judgment was granted by the Honorable William L. Standish in respect to the Plaintiffs' claim under the Fourth Amendment. The District Court determined that the pushing and striking of the decedent, although arguably intentional and clearly terminating Mr. Robitzer's movement, was not a seizure for purposes of prosecution of the decedent's claim under the Fourth Amendment in that at the time Mr. Robitzer was struck and pushed the Liquor Control Enforcement officers were in the process of arresting a third party for disorderly behavior.

Upon conclusion of the trial of the captioned action before the District Court the jury was instructed, in reliance upon the references in Graham v.

Connor to the standard for analysis of Fourteenth Amendment claims recited in Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973) cert. den., 414 U.S. 1033 (1973) that:

> If a defendant's conduct or use of force caused severe injury, was grossly disproportionate to the need for action under the circumstances and was inspired by malice, that defendant is liable for plaintiff under Section 1983."

The Petitioner objected to the charge given by the District Court and instead urged that a reckless indifference or gross negligence standard was appropriate to a § 1983 claim pursued under and derived from the Fourteenth Amendment.

The jury, after several days of deliberation, and a reported deadlock, returned a verdict in favor of the Respondents.

The United States Court of Appeals for the Third Circuit affirmed the trial court's grant of summary judgment on the Petitioner's Fourth Amendment claim and the propriety of the trial court's jury instructions in a judgment order dated June 30, 1993.

ARGUMENT

I.

The decision of this Court in Graham v. Connor, 490 U.S. 386 (1989) afforded much needed guidance and clarification to the trial bench and to § 1983 practitioners before the United States District Courts - in stark contrast to the lucidity of the holding in Graham citizens pursuing excessive force claims predicated upon a violation of the Fourteenth Amendment to the United States Constitution under 42 U.S.C. § 1983 confront a welter of judicial confusion and inconsistency which is a poignant if ineloquent prayer to this Court for an answer. No judge of any United States District Court in this land nor any appellate jurist can speak with confidence or certainty of the standard of conduct which is appropriate-

ly derived from the Fourteenth Amendment to the United States Constitution in these cases.

The trial court in this action construed this court's reference in Graham to Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973) cert. den. 414 U S. 1033 (1973) to dictate a return to the standard derived from Johnson, including its malice component, which appears to have neither textual constitutional support nor any place in modern constitutional jurisprudence.

It can almost never be said of and even more rarely proved that the victim of a recklessly discharged bullet, a hurtling police automobile, or a blow inflicted in the course of the seizure of a third party that they were the object of malice. The perpetuation of malice as a component of a violation of the Fourteenth Amendment action under 42

U.S.C. § 1983 leaves victims of this type of conduct who are met by the immunization of the soverign in state courts under state law without a remedy.

Gross negligence or recklessness, not malice, are the common denominators of government actions which exceed the threshold of tolerance under the Fourteenth Amendment. When a state or police official is indifferent to the welfare of a citizen his or her right to due process has necessarily been infringed - similarly gross negligence entails a like abandonment of the citizens right to due process.

Malice is defined as:

> A desire to harm others or to see others suffer or the intent, without just cause or reason, to commit an unlawful act that will result in injury to another or others.
> American Heritage Dictionary, Second College Edition, Houghton Mifflin Co., Copyright 1982.

The state of mind reflected by the common understanding of the term malice is hardhearted, rarely demonstrable and hopefully rarely present where reckless or grossly negligent state action results in injury. The constitutional hiatus which exists between these two states of mind is not supportable by reference to the Fourteenth Amendment and 42 U.S.C. § 1983 in juxtaposition which literaly require only a showing of deprivation. While it is clear that simple negligence could not fairly support a constitutional tort, it is equally clear that a deprivation of a citizen's right to life, liberty, or property without due process can and does occur long prior to the attainment of the meanness of spirit connoted by a requirement that malice be a factor in the deprivation.

The disparity among the Circuit Courts in respect to the appropriate standard to be utilized under the Fourteenth Amendment, both pre and post Graham, is well documented elsewhere and need not be catalogued here. See, e.g. Civil Rights Litigation and Attorney Fees Annual Handbook, Volume 7, Clark Boardman & Callaghan, Copyright 1991 pages 67 through 69 wherein the authors review extensively the vagaries which presently exists among and within the Circuits relative to the standards applied to establish a violation of the Fourteenth Amendment for purposes of prosecution under 42 U.S.C. § 1983.

The death of Albert J. Robitzer cannot in truth be said to have been a product of malice on the part of the Pennsylvania Liquor Control Enforcement officers who struck him, however, it is also true that he was the victim of reck-

lessness, indifference, and gross negligence and should have been obliged to prove no more to demonstrate that his life was taken in violation of the United States Constitution.

II.

This Court has determined that: "[W]hen there is a governmental terimination of movement through means intentionally applied" that a seizure has occurred for purposes of analysis of an excessive force claim under the Fourth Amendment to the United States Constitution. Brower v. County of Inyo, 109 S.Ct. 1378 (1989). In Graham v. Connor, supra, this Court also expressed a strong preference that excessive force claims in a pre-arrest context be analyzed under the Fourth Amendment's objective reasonableness standard.

Immediately prior to his death Albert J. Robitzer twice attempted to walk toward two officers of the Pennsylvania Bureau of Liquor Control Enforcement while requesting that they calm down. These events occurred in the midst of a fundraising dance intended to raise money for Mr. Robitzer's heart transplant which was then fairly imminent. The Liquor Control Enforcement officers were busily engaged in handcuffing Mr. Robitzer's son-in-law who had raised his voice as a result of earlier actions of the plain clothes officers in effecting arrests of suspected minors during the fundraising event. Mr. Robitzer's attempts to approach and speak to and hopefully calm the officers were thwarted by blows and shoves directed at him by the officers which led to his death a few minutes later. The District Court determined that prevent-

ing Mr. Robitzer from walking towards them by blows and shoves did not constitute a "termination of movement through means intentionally applied". Brower, supra.

Review of the circumstances of Mr. Robitzer's death reflects however that the circumstances are indeed analogous to the termination of movement effected by a road block or other physical barrier to a citizen's freedom of movement which results in harm. It is clear both that the officers' conduct caused Mr. Robitzer to stop and/or be thrown backwards and it is equally clear that the officers' conduct caused his injuries. While Mr. Robitzer was not being arrested, it is nonetheless apparent that when the officers turned to strike and push him that he was the focus of their intentional acts and that his freedom of

movement, i.e., walking towards them was terminated by their conduct.

Given the preference expressed in Graham for analysis of pre-arrest excessive force claims under the Fourth Amendment and the analogy which exists between the officers conduct in this action and the facts in Brower v. County of Inyo, the Petitioner suggests that the Fourth Amendment was the more appropriate source of Mr. Robitzer's rights in this action.

Although Al Robitzer was not being arrested he was most certainly the subject of a seizure, however fleeting, when the attention of the officers was directed toward him and his progress toward them was terminated by blows and shoves. These actions occurred in a context in which the officers either knew or should have known that the event they were raiding was a fundraiser for

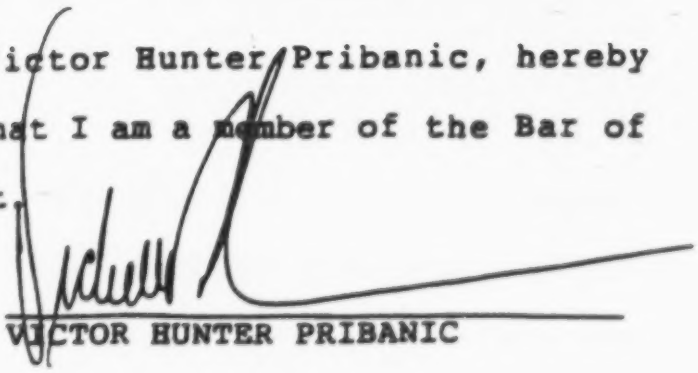
Mr. Robitzer and after they were made aware that he was both the object of the event and the subsequent victim of at least some of their blows - this it is urged is objectively unreasonable conduct which most appropriately is perceived as having occurred in the context of a seizure. The question of the appropriate source of constitutional protection under these circumstances is a question which has not been but should be addressed by this Court.

RESPECTFULLY SUBMITTED

VICTOR HUNTER PRIBANIC
Attorney for Petitioner

CERTIFICATE OF MEMBERSHIP IN BAR

I, Victor Hunter Pribanic, hereby certify that I am a member of the Bar of this Court.



VICTOR HUNTER PRIBANIC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOLORES CHISNELL, Executrix of the Estate of Albert J. Robitzer, Jr., and in her own right as the natural sister of decedent, Albert J. Robitzer, Jr., BARBARA ROBITZER and KRISTINE D. JANKOVIK,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 90-583
PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT, PENNSYLVANIA STATE POLICE, ROBERT JOHNSON, CLAIR WITKOWSKI, STEVE SANDROVICH, JAMES McDONALD and RONALD K. RANDIC, Individually and in their capacity as Agents of the Pennsylvania State Police Bureau of Liquor Control Enforcement,	)	
Defendants.	)	

MEMORANDUM

I

This is a civil action in which

plaintiffs, Dolores Chisnell, executrix of the estate of Albert J. Robitzer and in her own right, Barbara Robitzer and Kristine D. Jankovik, seek damages from defendants for the alleged violation of their civil rights under 42 U.S.C. § 1983, as well as damages for various state law claims.[1] Defendants have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, the motion for summary judgment will be granted in part and denied in part.

II

Plaintiffs' complaint alleges the

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1. With respect to the state law claims, Dolores Chisnell, as executrix of the estate of Albert J. Robitzer, seeks damages from defendants under the wrongful death and survival statutes of Pennsylvania, 42 Pa. C.S.A. §§ 8301 and 8302, and the individual plaintiffs seek damages from defendants for intentional and negligent infliction of emotional distress.

following facts:

1. Plaintiff, Dolores Chisnell, is a resident of Westmoreland County, Pennsylvania. She is the personal representative of the estate of Albert J. Robitzer, Jr. deceased, and the natural sister of the decedent.

2. Plaintiff, Barbara Robitzer, is a resident of Westmoreland County, Pennsylvania. Mrs. Robitzer is the surviving spouse of the decedent.

3. Plaintiff, Kristine D. Jankovik, is a resident of Westmoreland County, Pennsylvania. Ms. Jankovik is the surviving daughter of the decedent.

4. Defendants Robert Johnson, Clair Witkowski, Steve Sandrovich, James McDonald and Ronald K. Randic (collectively, the individual defendants) were, at all relevant times, enforcement officers employed by the defendant Pennsyl-

vania State Police Bureau of Liquor Control Enforcement (LCE).[2]

5. At all relevant times, the individual defendants were acting as agents of the Commonwealth of Pennsylvania, the Pennsylvania State Police and the LCE. The individual defendants were acting under color of law and in their individual capacities.

6. On March 5, 1988, a private fundraising event, entitled "The A.J. Robitzer Helping Hands Transplant Fund, Benefit Dance," was held at the Italian American Social Club in Export, Pennsylvania to raise funds for the decedent, Albert J. Robitzer. The funds were to be used to defray the costs of a heart transplant which Mr. Robitzer was to

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2. In addition to being enforcement officers, Messrs. Sandrovich and McDonald were supervisors for the LCE.

undergo in the near future.

7. At approximately 11:30 p.m., acting pursuant to an anonymous tip, defendants Johnson, Witkowski and Randic (the arresting officers) raided the fund-raising event to investigate alleged violations of The Liquor Code. The arresting officers entered the building and effected the arrest of a female guest by physically removing her to the kitchen area and placing her under arrest. At the time of their entry, the arresting officers were not in uniform and there was no visible sign that they were enforcement officers with the LCE.

8. The arresting officers were all present in the kitchen when a guest approached defendant Johnson and questioned his conduct. An argument and scuffle ensued. Mr. Robitzer, the decedent, attempted to speak to the arresting officers and requested that they "take

it easy." He advised them that this type of conduct was unnecessary. At this time, one or more of the arresting officers struck Mr. Robitzer in the chest with their hands or elbows. Plaintiffs were present in the kitchen and witnessed the foregoing conduct of the arresting officers.

9. An atmosphere of confusion, excitement and disorder was caused by the manner in which attempts were made to effect the arrests of several guests, and by the failure of the arresting officers to properly identify themselves and the nature of their business.

10. At the time of the events referred to in paragraphs 7 and 8 hereof, defendants Sandrovich and McDonald, the senior and supervisory enforcement officers (the supervisory officers), were completely absent from the vicinity of the Italian American Social Club, con-

trary to the manner in which the investigation had been planned. No arrests were to have been effected until uniformed back-up officers were present to ensure that disorder was avoided.

11. Defendants knew, or should have known, of the nature of this engagement, the presence of the decedent, his susceptibility to injury and the relationship between plaintiffs and the decedent.

12. As a direct and proximate cause of defendants' conduct, Mr. Robitzer suffered a heart attack and died shortly thereafter.

III

In their brief in support of summary judgment, defendants give the following statement of the case:

1. On March 2, 1988, the LCE received an anonymous telephone call that a "beer blast" would be taking place at the Italian American Club in Export,

Pennsylvania on March 5, 1988 at 10:00 p.m., and that it was expected that minors would be drinking at that event.

2. The individual defendants took part in the investigation of this anonymous tip, arriving at the club at approximately 11:30 p.m. Defendants Johnson, Witkowski and Randic entered the club to conduct undercover surveillance. Although the officers were not dressed in official uniform, they did carry identification cards and badges. In the meantime, defendants McDonald and Sandrovich left the vicinity of the club in their vehicle to notify local police of their investigation.

3. At no time prior to their arrival at the Italian American Club, or immediately upon entering the club, were any of the individual defendants aware that a fundraiser was in progress.

Moreover, they saw no signs indicating that a fundraiser was taking place.

4. Once inside the club, defendant Randic proceeded to the front bar to purchase an alcoholic beverage. Defendants Johnson and Witkowski went to the dining room area and observed 150 to 200 patrons. A disc jockey was present and persons of questionable age were observed in possession of alcoholic beverages.

5. Shortly thereafter, defendant Johnson observed a youthful-looking woman drinking an alcoholic beverage. He identified himself, showed her his badge and asked for identification. The young woman did not have identification, but stated that she was 19 years old. Defendant Johnson then placed her under arrest and informed her that she would be cited for underage drinking.

6. James Jankovik, a guest at the fundraiser, approached defendant Johnson but refused to provide identification upon request. While defendant Johnson was distracted by Mr. Jankovik, the 19 year old woman moved to the area of the disc jockey. Defendant Johnson went up to the woman and took her by the arm. Mr. Jankovik followed. At this time, another woman approached defendant Johnson and asked what was going on. In response, defendant Johnson showed the woman his badge, verbally identified himself, and stated his purpose for being there. The disc jockey also asked for identification which defendant Johnson provided. He again stated his purpose for being at the club. Defendant Johnson then asked the disc jockey to turn up the house lights, but the disc jockey indicated that he could not do so.

7. The woman who had approached defendant Johnson asked him to discuss the matter in private. He and the 19 year old woman followed this woman into the kitchen. Mr. Jankovik followed. While in the kitchen, defendant Johnson had his badge case open in his hand. Defendant Johnson informed the woman that the 19 year old woman could be cited for underage drinking. Mr. Jankovik became increasingly verbal and belligerent, stating that defendant Johnson would not ruin the fundraiser for his father-in-law. Prior to this time, defendant Johnson was unaware that this event was a fundraiser.

8. Defendant Johnson asked Mr. Jankovik to settle down and let him do his job. However, Mr. Jankovik became more upset and verbally abusive. Defendant Johnson told Mr. Jankovik that, if he persisted in this conduct, he would

be arrested for disorderly conduct. Mr. Jankovik became more hostile. Defendant Johnson informed Mr. Jankovik that he was under arrest and attempted to handcuff him. Mr. Jankovik resisted, grabbing defendant Johnson's shirt and tearing the pocket. Defendant Johnson again attempted to handcuff him, at which time Mr. Jankovik grabbed defendant Johnson's jacket and knocked him to the ground.

9. At some point, it was learned that patrons were aware that State police were on the premises. After properly identifying themselves, defendants Witkowski and Randic began stopping suspected minors who were drinking alcoholic beverages and requested identification. At this time, defendants McDonald and Sandrovich returned to the club without back-up officers. They remained outside the club and assisted in detain-

ing the minors. Defendant Randic then contacted the Pennsylvania State Police on a telephone located within the club.

10. Defendant Witkowski eventually entered the kitchen and went to defendant Johnson's assistance, also identifying himself verbally and with his badge. During the struggle with Mr. Jankovik, defendant Johnson was grabbed from behind and pulled away from Mr. Jankovik. Defendant Witkowski was also grabbed from behind. Mr. Jankovik remained physically and verbally abusive. Thereafter, defendant Randic entered the kitchen, showed his identification and assisted in handcuffing Mr. Jankovik.

11. Near the end of the struggle, two women were pointing to a man on the other side of the table and stated that he was the person the benefit was for and that, if he had a heart attack, they would hold the officers responsible.

Defendant Witkowski told the women to get him out of the kitchen area. At no time did either defendants Johnson, Witkowski or Randic intentionally or knowingly strike any individual who was identified to them as being Albert Robitzer, Jr., or the man in need of a heart transplant.

12. After taking Mr. Jankovik out of the Italian American Club, someone indicated that an individual was having a heart attack. That person was told to contact 911 because the officers did not have radios in their cars. The individual having the heart attack was later identified as Albert Robitzer, Jr. In addition to various troopers from the Pennsylvania State Police, an ambulance arrived on the scene.

13. Several minors were cited for underage drinking. There is no evidence that any departmental policy or regula-

tion was violated during the course of the investigation of this fundraiser.

IV

Eleventh Amendment Bar

Defendants assert that the Eleventh Amendment bars plaintiffs' Section 1983 actions against the State agencies and the officers acting in their official capacities in this civil action. In response, plaintiffs concede that the Eleventh Amendment bars adjudication in federal court of their claims against the State agencies and the officers in their official capacities. Accordingly, defendants' motion for summary judgment as to the Section 1983 claims asserted against the State agencies and the officers acting in their official capacities will be granted.

Section 1983 Claims of Dolores Chisnell, in her own right, Barbara Robitzer and Kristine D. Jankovik

In a reply brief filed on January 28, 1992, defendants assert that plaintiffs Dolores Chisnell, in her own right, Barbara Rotizer and Kristine D. Jankovik lack "standing" to maintain their Section 1983 claims. Specifically, defendants assert that none of the officers' allegedly illegal conduct described in the complaint was directed toward Dolores Chisnell, in her own right, Barbara Rotizer or Kristine Jankovik. Rather, the allegatins of the complaint clearly establish that the claims of these plaintiffs are based on being present and witnessing the incident in question. Although defendants have framed this contention as an issue of "standing," the court concludes that it is more appropriately viewed as a failure to state a claim, and, after consideration, the court concludes that defendants' motion for summary judgment

as to the Section 1983 claims of plaintiffs Dolores Chisnell, in her own right, Barbara Robitzer and Kristine D. Jankovik against the officers in their individual capacities should be granted.

In Thomas v. Frederick, 766 F.Supp. 540 (W.D.La. 1991), a black woman, her husband and daughter brought a civil rights action against a sheriff and two deputy sheriffs arising out of one of the deputy's alleged use of excessive force when restraining the woman. With respect to the Section 1983 claim of the daughter, the district court held that the daughter, who had observed the deputy's actions, was a bystander who did not have a Section 1983 claim. The court stated:

* * *

3. The Bystander Rule

Under the standards of Johnson, supra, a plaintiff must first establish a significant injury to recover

for a claim of excessive force. In the instant case, no plaintiff has established a significant injury other than Mary Thomas.

Furthermore, it is well-established that a civil rights claim must be based upon a violation of a plaintiff's personal rights. A bystander who witnesses a police action, but who is not himself an object of that action, cannot recover for any resulting emotional injuries under § 1983, although there may be such a claim under state tort law. There is no constitutional right to be free from witnessing police action. Grandstaff v. Borger, 767 F.2d 161, 172 (5th Cir.1985), cert. denied, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987). See also Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986). Archuleta v. McShan, 897 F.2d 495 (10th Cir.1990).

Plaintiffs argue that [the daughter] was a participant and not a bystander, since it was her action in striking Frederick over the head with her fist that caused him to release Mary Thomas from his use of excessive force. Plaintiffs offer no support for this position, and the court can find none. There simply is no showing that [the daughter]'s personal constitutional rights were violated.

Since no other plaintiff can show a significant physical injury, and there is no authority for finding § 1983 liability based solely upon an emotional injury, (footnote omitted)

> all other federal claims of the plaintiffs fail.
>
> * * *

766 F.Supp. at 556-57.

Similarly, in the present case, a review of the complaint reveals that the Section 1983 claims of plaintiffs Dolores Chisnell, in her own right, Barbara Robitzer and Kristine D. Jankovik are based on the emotional distress suffered by these plaintiffs as a result of witnessing the conduct of the arresting officers and the death of Mr. Robitzer. Under the circumstances, it is clear that they have failed to state Section 1983 claims. Therefore, summary judgment will be entered against plaintiffs on Counts VII, VIII and IX of the complaint.

Section 1983 Claim of the Estate of Albert J. Robitzer, Jr.

In Count III of the complaint, plaintiff, Dolores Chisnell, as the executrix of the estate of Albert J. Robitzer, Jr., asserts a Section 1983 claim against defendants under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The court will address each basis of the estate's Section 1983 claim seriatim.

Fourth Amendment

With respect to the estate's Section 1983 claims under the Fourth Amendment, defendants contend that the factual material of record establishes that the assertion that Mr. Robitzer was subjected to an unreasonable "seizure" under the Fourth Amendment is untenable. Assuming, arguendo, that Mr. Robitzer was struck by defendants Johnson and Witkowski, defendants argue that it is undisputed that any such contact oc-

curred while these officers were engaged in a struggle with Mr. Jankovik in the kitchen. Therefore, defendants contend that there was no "seizure" of Mr. Robitzer by the officers, nor may any intent to seize Mr. Robitzer be inferred. The court agrees.

A seizure in violation of the Fourth Amendment requires an intentional acquisition of physical control. Brower v. Inyo County, 489 U.S. 593, 596 (1989). See also Tennessee v. Garner, 471 U.S. 1, 7 (1984) (Whenever an officer restrains the freedom of a person to walk away, he has seized that person). Although the depositions of plaintiffs Dolores Chisnell, Barbara Robitzer and Kristine D. Jankovik describe physical contact between one or more of the individual defendants and Mr. Robitzer, none of these plaintiffs indicate that the officers in any way attempted to exert

physical control over Mr. Robitzer or that they objected to his removal from the kitchen by Ms. Chisnell. To the contrary, it is clear that the officers' actions were directed toward Mr. Jankovik, Mr. Robitzer's son-in-law. Under the circumstances, the court concludes that defendants are entitled to summary judgment on the estate's Section 1983 claim based on an unlawful "seizure" of Mr. Robitzer under the Fourth Amendment.[3]

Fifth Amendment

Turning to the estate's Section 1983 claim under the Fifth Amendment, defendants note that the protection of the Fifth Amendment attaches only when

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3. Based on this determination, it is unnecessary to address defendants' claim of qualified immunity under Anderson v. Creighton, 483 U.S. 635 (1987).

the federal government denies a person the right to life, liberty or property without due process of law. In the present case, the complaint alleges that defendants were acting pursuant to the laws of the Commonwealth of Pennsylvania. Therefore, it is argued that the Fifth Amendment imposes no restraints on the defendants and the court should dismiss the claim of Mr. Robitzer's estate under the Fifth Amendment. In response, it is conceded that the Fifth Amendment is not a basis for the Section 1983 claim of Mr. Robitzer's estate. Accordingly, defendants' motion for summary judgment will be granted as to the estate's Section 1983 claim under the Fifth Amendment.

Fourteenth Amendment

Finally, addressing the estate's Section 1983 claim under the Fourteenth

Amendment, defendants assert that the primary inquiry in addressing an excessive force claim under the Fourteenth Amendment is whether the conduct of the state officials was so egregious or intolerable as to shock the conscience of the court and constitute a constitutional violation as opposed to a mere violation of state tort law. In response, plaintiffs maintain that they have asserted a substantive due process violation under the Fourteenth Amendment based on their allegations that the officers knew of the nature of the event; that they knew of the precarious health of the decedent; and that they, nevertheless, proceeded to effect arrests in a manner that could cause serious harm to, or the death of, Mr. Robitzer.

After consideration, the court concludes that a material issue of fact exists which precludes summary judgment

in defendants' favor on the estate's Section 1983 claim under the Fourteenth Amendment. Specifically, the officers' knowledge of the nature of the event and, therefore, the reasonableness of their conduct in light of that knowledge, is hotly disputed by the parties. Accordingly, defendants' motion for summary judgment on the estate's Section 1983 claim under the Fourteenth Amendment will be denied.

Doctrine of Respondeat Superior

In Section 1983 actions, it is clear that liability may not be premised on a theory of respondeat superior. See, e.g., Rizzo v., Goode, 423 U.S. 362 (1976). In this regard, defendants assert that defendants McDonald and Sandrovich, the supervising officers, cannot be liable for a violation of Mr. Robitzer's constitutional rights under

Section 1983 because these officers were not personally involved in the challenged conduct. Defendants note that defendants McDonald and Sandrovich appear to be named solely in their senior and supervisory capacities; that they were not present in the Italian American Club when the alleged arrests, assaults and confusion occurred; and that there is no allegation that these officers knew of, or condoned, the alleged conduct of the arresting officers.

In response, plaintiffs acknowledge that defendants McDonald and Sandrovich may not be held liable under Section 1983 based on the theory of respondeat superior. However, plaintiffs maintain that supervisory officers, such as defendants McDonald and Sandrovich, need not personally participate in the events complained of. Rather, plaintiffs maintain that the issue of liability as to

defendants McDonald and Sandrovich is whether these supervisory officers did something, or failed to do something which they ought to have done, that was a proximate cause of the alleged violation of Mr. Robitzer's constitutional rights. See Black v. Stephens, 662 F.2d 181, 189 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982) (To hold police chief liable under Section 1983 for the unconstitutional actions of one of his officers, a plaintiff is required to establish a causal connection between the police chief's actions and the officer's unconstitutional activity).

Based on the present state of the record, the court is constrained to conclude that material issues of fact exist which preclude summary judgment in favor of defendants on the estate's claim against defendants McDonald and Sandrovich under Section 1983. Accord-

ingly, the motion will be denied without prejudice to the rights of said defendants to renew at the time of trial.

Sovereign Immunity as to State Law Claims

With respect to the state law claims asserted in Counts I, II, IV, V and VI, defendants maintain that these claims are barred by sovereign immunity. See 42 Pa.C.S.A. § 8521 et seq. After consideration, the court agrees.

In Moore v. Commonwealth, Depart. of Justice, 114 Pa.Commw. 56, 538 A.2d 111 (1988), appellant, Joseph Moore, had been an eyewitness to an armed robbery committed by Andre Huett and was prepared to testify as a prosecution witness. Huett pleaded guilty to the crime and was incarcerated at the State Correctional Institution at Graterford (SCIG). Huett served ten months of his sentence when Cuyler, the Superintendent of SCIG,

Reid, the Director of Treatment at SCIG, and Dillman and Zelles, correctional counselors, voted to approve Huett's application for a two-day furlough. When Huett failed to return from the furlough, SCIG officials reported him to state and local authorities as an escapee. One month later, Huett shot appellant Moore, causing paraplegia and loss of hearing.

Appellant Moore's complaints against the Commonwealth and the individual defendants alleged essentially that the defendants engaged in willful misconduct and were otherwise negligent in approving the furlough and in failing to properly diagnose, treat or recognize Huett's psychiatric condition.

The trial court concluded that the commonwealth was entitled to sovereign immunity, and that Cuyler was entitled to official immunity. As to Reid,

Dillman and Zelles, who waived official immunity by not raising it in an answer, the trial court concluded that they had no common law duty to protect appellant Moore from Huett's actions. Accordingly, the trial court entered summary judgment in favor of the defendants.

On appeal, the Commonwealth Court of Pennsylvania held, inter alia, that Cuyler, the prison superintendent, was also entitled to statutory sovereign immunity. The appellate court stated:

* * *

> Likewise, we conclude that Superintendent Cuyler is entitled to immunity. Section 2310 of Act 152, 1 Pa. C.S. § 2310, provides:
>
> > Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune

> from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42....

The provisions of Title 42, specifically Section 5110(a) of Act 152, provided:

> Limited waiver of sovereign immunity
>
> (a) General rule.--The General Assembly, pursuant to section 11 of Article I of the Constitution of Pennsylvania, does hereby waive, in the following instances only and only to the extent set forth in this section ... sovereign immunity as a bar to an action against Commonwealth agencies, and their officials and employees acting within the scope of their duties, for damages arising out of a negligent act or omission where the damages would be recoverable under the common law or a statute creating a cause of action if caused by a person not having available the defense of sovereign immunity. (footnote omitted).

(Emphasis added.)

We believe that these statutory provisions are clear and unambiguous in stating that the Commonwealth, and

its officials and employees, enjoy the same statutory sovereign immunity. In other words, if the Commonwealth is entitled to sovereign immunity under Act 152, then its officials and employees acting within the scope of their duties are likewise immune. The fact that the General Assembly saw fit to statutorily retain the common law defense of official immunity in Section 5110(b) does not mean that it never intended to grant statutory sovereign immunity to officials and employees. Rather, the statutory retention of this common law defense means merely that an official may additionally assert common law official immunity in cases where the individual is precluded from asserting sovereign immunity under Section 5110(a). Although this Court's prior case law suggested that Act 152 did not affect official liability as it existed under the common law, see Estate of Armstrong v. Pennsylvania Board of Probation and Parole, 46 Pa. Commonwealth Ct. 33, 405 A.2d 1099 (1979), we can after diligent research find no case wherein our Supreme Court has expressly addressed this precise issue. (footnote omitted). In the absence of contrary instruction from our Supreme Court, we cannot simply ignore clear and unambiguous statutory language. 1 Pa.C.S. § 1921(B).

* * *

538 A.2d at 114-15.[4]

In the present case, thee is no dispute that the individual defendants were acting within the scope of their employment as enforcement officers for the LCE at the time of the incident in question. Moreover, it is undisputed that the acts of the individual defendants do not fall within any of the nine exceptions to sovereign immunity set forth in 42 Pa.C.S.A. § 8522(b)

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4. Although lower state court decisions are not controlling on an issue which the highest court of a state has not spoken, federal courts must attribute significant weight to these decisions in the absence of any indication that the highest state court would rule otherwise. See, e.g., Wisniewski v. Johns-Manville Corp., 759 F.2d 271 (3d Cir. 1985), appeal after remand, 812 F.2d 81 (3d Cir. 1987). With respect to the issue whether the individual defendants are entitled to sovereign immunity as to plaintiffs' state law claims, this court predicts that the Pennsylvania Supreme Court would decide the issue in accordance with the decision of the Pennsylvania Commonwealth Court in Moore.

(1)-(9). Therefore, the court concludes that, under the clear and unambiguous language of 1 Pa.C.S.A. § 2310, the individual defendants are entitled to claim sovereign immunity as to the state law claims asserted in this complaint and that summary judgment will be entered in favor of defendants on Counts I, II, IV, V and VI.[5]

One further point needs to be addressed. Although the court has concluded that defendants are entitled to

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5. Plaintiffs assert that their allegation of "willful misconduct" on the part of the individual defendants precludes the officers from claiming sovereign immunity. This argument is meritless. Willful misconduct is relevant to the defense of official immunity in an action against an employee of a local agency. See 42 Pa.C.S.A. §§ 8545-8550. However, the General Assembly has not included any such abrogation of the immunity provided to Commonwealth agency employees. See Yakowicz v. McDermott, 120 Pa.Commw. 479, 548 A.2d 1330, 1334, FN 5 (1988).

summary judgment on plaintiffs' state law claims, including the claims for wrongful death and survival, this determination does not affect the capacity of Mrs. Chisnell to maintain a Section 1983 claim under the Pennsylvania Wrongful Death and Survival Acts, 42 Pa.C.S.A. §§ 8301 and 8302, on behalf of Mr. Robitzer's estate. See Baffa v. Black, 481 F.Supp. 1083, 1085-86 (E.D.Pa. 1979) (Plaintiff had standing and capacity as executor of decedent's estate to initiate lawsuit against defendants in their capacities as a police officer and police commissioner for alleged violation of civil rights statute as long as plaintiff was suing by virtue of his status as executor of decedent's estate and not in his own right).

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOLORES CHISNELL, Executrix of the Estate of Albert J. Robitzer, Jr., and in her own right as the natural sister of decedent, Albert J. Robitzer, Jr., BARBARA ROBITZER and KRISTINE D. JANKOVIK,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 90-583
PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT, PENNSYLVANIA STATE POLICE, ROBERT JOHNSON, CLAIR WITKOWSKI, STEVE SANDROVICH, JAMES McDONALD and RONALD K. RANDIC, Individually and in their capacity as Agents of the Pennsylvania State Police Bureau of Liquor Control Enforcement,	)	
Defendants.	)	

ORDER

AND NOW, this 9th day of June, 1992, in accordance with the foregoing

memorandum, it is hereby ORDERED as follows:

(a) The motion of defendants for summary judgment is denied with respect to the Section 1983 claim asserted in Count III under the Fourteenth Amendment by plaintiff Dolores Chisnell, executrix of the estate of Albert J. Robitzer, Jr., against the individual defendants Robert Johnson, Clair Witkowski, Steve Sandrovich, James McDonald and Ronald K. Randic, in their individual capacities; and

(b) In all other respects, defendants' motion for summary judgment is granted, and summary judgment is entered in favor of defendants and against plaintiffs.

S/William L. Standish
William L. Standish
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3664

DOLORES CHISNELL, executrix of the estate of ALBERT J. ROBITZER, JR., and in her own right as the natural sister of decedent, ALBERT J. ROBITZER, JR.; BARBARA ROBITZER; KRISTINE D. JANKOUR,

Appellants

v.

PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT; PENNSYLVANIA STATE POLICE; ROBERT JOHNSON; CLAIR WITKOWSKI; STEVE SANDROVICH; JAMES McDONALD; RONALD K. RANDIC, Individually and in their capacity as Agents of the PENNSYLVANIA STATE POLICE and PENNSYLVANIA STATE POLICE and PENNSYLVANIA STATE POLICE BUREAU OF LIQUOR CONTROL ENFORCEMENT

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil Action No. 90-00583)
District Judge:
Honorable William L. Standish

Argued June 22, 1993

BEFORE: STAPLETON, MANSMANN and HUTCHINSON, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ORDERED AND ADJUDGED that the judgment of the district court dated September 25, 1992, be and is hereby affirmed.

Costs taxes against appellants.

By the Court,

S/ Walter K. Stapleton
Circuit Judge

ATTEST:

S/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: JUN 30 1993

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment 4

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juris-

diction the equal protection of the laws.

United States Constitution, Amendment 14

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983